APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 September Term, 1998
97cv02093

William F. Rogers,
Appellant

V.

FILED
MAY 20 1999

District of Columbia,
Appellee

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: [/s/]
Robert A. Bonner
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 September Term, 1998
97cv02093

William F. Rogers,
Appellant

V.

FILED
MAY 20 1999

District of Columbia,
Appellee

BEFORE: Edwards, Chief Judge, Rogers, Circuit Judge, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing filed May 5, 1999, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: [/s/]
Robert A. Bonner
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 **September Term, 1998**

William F. Rogers,
Appellant,

V.

FILED
APR 7 1999

District of Columbia,
Appellee,

Appeal from the United States District Court
for the District of Columbia
(No. 97cv2093)

BEFORE: **EDWARD**, Chief Judge, **ROGERS**, Circuit Judge, and **BUCKLEY**, Senior Circuit Judge

JUDGMENT

This cause came to be heard on appeal from an opinion and judgment of the United States District Court for the District of Columbia and was briefed by counsel.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

The issues have been accorded full consideration by the Court, and occasion no need for a published opinion. See D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the judgment of the District Court is affirmed. With respect to Mr. Rogers's age discrimination claim, we affirm essentially for the reasons stated in the District's Court's opinion. With respect to his First Amendment claim, the evidence demonstrates that the termination of Mr. Rogers could not have been in retaliation for his statements to the media, because he was placed on a reduction-in-force list and so notified before the occurrence of his alleged protected speech. Moreover, because the District of Columbia raised this argument below, it is proper for this court to decide the First Amendment claim on these grounds. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."); Freeman v. B & B Assocs., 790 F.2d 145, 151 (D.C. Cir. 1986) ("An appellate court . . . will freely consider any argument by an appellee that supports the judgment of the district of court including arguments rejected by the district court and even arguments contradicting the logic of the district court.").

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See FED.R.APP.P. 41(b); D.C. CIR. R. 41.

Per Curiam
FOR THE COURT:
/s/
Mark J. Langer
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 September Term, 1998
97cv02093

William F. Rogers,
Appellant

V.

FILED
Mar 31 1999

District of Columbia,
Appellee

BEFORE: Edwards, Chief Judge, Rogers, Circuit Judge, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of the briefs and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purposes of Rule 34(j) of the General Rules of this Court and also meets one or more of the criteria set forth in that Rule, it is

ORDERED, by the Court, that the above case will be considered and decided without oral argument.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE COLUMBIA CIRCUIT

No. 98-7109 September Term, 1998
97cv02093

William F. Rogers,
Appellant

V.

FILED
Mar 19 1999

District of Columbia,
Appellee

ORDER

It is **ORDERED**, by the Court on its own motion, that the above entitled case be scheduled for oral argument on Monday, April 26, 1999 at 9:30 a.m. before Chief Judge Edwards, Circuit Judge Rogers, and Senior Circuit Judge Buckley.

A further order of the Court will be issued regarding allocation of time for argument.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM F. ROGERS, Plaintiff,	:	
V.	:	Civil Action No. 97-2093 (GK)
DISTRICT OF COLUMBIA Defendant.	:	FILED MAY 27 1998

MEMORANDUM OPINION

Plaintiff William F. Rogers brings this action pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626, as amended ("ADEA"), and the First and Fourteenth Amendments to the United States Constitution. Rogers, who is over 40 years old, is a former mathematics teacher in the District of Columbia Public Schools. He was laid off during a reduction in force in July 1996. Rogers alleges that Defendant laid him off because of his age and in retaliation for prior

constitutionally protected speech on matters of public concern, namely the curriculum at Anacostia Senior High School.

This matter is now before the Court on Defendant's Motion for Summary Judgment, [#20], on the grounds that Plaintiff's Complaint is based on charges that were untimely filed with the Equal Employment Opportunity Commission ("EEOC").

Upon consideration of Defendant's Motion, Plaintiff's Opposition, Defendant's Reply, and the entire record herein, for the reasons discussed below, Defendant's Motion for Summary Judgment [#20] is hereby **granted**.

I. Background [1]

Rogers began working for the District of Columbia Public Schools in 1972. He worked at Anacostia Senior High School as a mathematics teacher from 1973 through July 1996.

On May 10, 1996, the principal of Anacostia Senior High School, Stephen Wesley, verbally informed Rogers that he had been placed on a list of nine teachers to be laid off. (Rogers Dep. At 238-39; Def.'s Mem. Summ. J at Ex. 13, Mem. From Rogers to Washington Teachers' Union of 5/13/96, at 1.)[2] On

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[1]Pursuant to Local Rule 108(h), "[i]n determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." Accordingly, unless otherwise noted, the Court takes its facts from Defendants' statement of Undisputed Facts.

[2]Rogers, in his Reply to Defendant's Statement of Material Facts, contests this fact. In his Declaration, he states that "[w]hile I knew there might be a reduction in force as early as May 1996, I did not know for certain that I would be terminated until June 29, 1996." (Rogers Decl. ¶ 8.) However, Rogers' May 13, 1996 Memorandum to the

May 13, 1996, Rogers sent a Memorandum to the Washington Teachers' Union complaining about the "action taken". In his memorandum, Rogers stated that "[o]n May 10, 1996, Mr. S. Wesely [sic], the principal of Anacostia Senior High School informed me verbally that I had been placed on a list of nine (9)

Washington Teachers' Union, as well as his testimony at deposition, contradict his Declaration. For example, he stated in his deposition that, on May 10, 1996, he was in his classroom when Mr. Wesley told him that he had been placed on the list of teachers to be "excessed". (Rogers Dep. At 238-39.)

Generally, "facts asserted by the non-movant, if adequately buttressed by evidentiary material, are to be taken as true." Abraham v. Graphic Arts Int'l Union, et al., 660 F.2d 811 (D.C. Cir. 1981) (emphasis added). However, "[s]elf-serving affidavits without factual support in the record will not defeat a motion for summary judgment." Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993). Rogers' claim that he was not verbally notified of his own pending termination (as opposed to being notified, as he implies, merely of an impending reduction in force) on May 10, 1996 is clearly contradicted by the evidence in the record. It is clear that Rogers' Declaration was created in response to Defendant's Motion for Summary Judgment in an attempt by Plaintiff to avoid summary judgment by creating issues of fact for trial.

teachers that will be excess [sic]". (Def.'s Mem. Summ. J. at Ex. 13, Mem. From Rogers to Washington Teachers' Union of 5/13/96, at 1) (emphasis in original). Beginning May 10, 1996, Rogers had several consultations with an attorney regarding the age discrimination claims he makes in this case.

On May 30, 1996, Rogers received a memorandum from Wesley notifying him that his position was identified "as one of the mandated reductions required of ANACOSTIA High School."[3] (Def.'s Mem. Summ. J. at Ex. 20, Mem. From Wesley to Rogers of 5/30/96, at 1.)

On June 10, 1996, Rogers' attorney at the time, Francine Weiss, wrote a letter to Wesley and the Superintendent of the

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[3]Rogers admitted in his deposition testimony that he received the 5/30/96 Memorandum and that, on the Memorandum itself, he wrote the date and class period during which he received it. (Rogers Dep. At 239.) Rogers claims in his Declaration, however, that he has "no recollection of receiving exhibit 20 [, the 5/30/96 Memorandum]". Again, the Court finds his statement to be clearly contradicted by the evidence in the record.

Board of Education alleging that Rogers was being wrongfully terminated in violation of the ADEA and the First Amendment.

On June 29, 1996, Rogers formally received notice of his termination in a letter dated June 25, 1996. He filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 16, 1997. On July 24, 1997, the EEOC dismissed his charge because it found that Rogers and his attorney "knew since at least June 9, 1996, of your impending termination. You filed your charge . . . more than 300 days since you first had notice of your effective termination date." (Def.'s Mem. Summ. J., Ex. 21, Letter from EEOC to Rogers of 7/24/97, at 1.)

II Analysis

A. Standard of Review

Summary judgment will be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is "material" if it might affect the outcome of the action under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In determining whether the movant has met this burden, a court must consider all factual inferences in the light most favorable to the non-moving party. McKinney v. Dole, 765 F.2d 1129, 1135 (D.C. Cir. 1985). Generally, "facts asserted by the non-movant, if adequately buttressed by evidentiary material, are to be taken as true." Abraham v. Graphic Arts Int'l Union, et al., 660 F.2d 811 (D.C. Cir. 1981) (emphasis added). However, "[s]elf-serving affidavits without factual support in the record will not defeat a motion for summary judgment."

Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993).

Once the moving party makes its initial showing, the nonmoving party must demonstrate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324; McKinney, 765 F.2d at 1135. Moreover, "[i]n determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." Local Rule 108(h).

B. Timeliness of EEOC Charge

The Supreme Court held in Chardon, et al v. Fernandez, et al., 454 U.S. 6, 7-8 (1981), that a cause of action for damages resulting from an unlawful termination of employment accrues when the decision is made and the plaintiff is notified that he will be terminated. The Chardon Court noted that "[t]he fact of

termination is not itself an illegal act" - instead, discrimination in the decision to terminate was the allegedly illegal act. Id at 8.

The Supreme Court's holding in Chardon binds the Court in this case. Rogers does not allege that it was illegal for Defendant to terminate him. Instead, he alleges that Defendant illegally discriminated and retaliated against him in its decision to terminate him. The Court must thus decide on what date, as a matter of law, Defendant's decision to terminate Rogers was communicated to him in a manner that constituted notice of his impending termination. In doing so, the Court must draw all factual inferences in the light most favorable to Rogers, the non-moving party. McKinney, 765 F.2d at 1135.

Rogers argues that, even if he had been notified in May 1996 of Defendant's decision to terminate him, that decision was not a "final and certain decision until Rogers received the specific RIF notice on June 29, 1996." (Pl.'s Opp'n to Def.'s

Mot. Summ. J. at 2.) He thus claims that the limitations period should not begin to run before that date.

In Delaware State College v. Ricks, 449 U.S. 250, 257 (1980), the plaintiff-employee received a notification letter from his employer stating that plaintiff would be denied tenure. The notice stated that the employer was "in the process" of considering plaintiff's challenge to its decision and could conceivably change its decision if plaintiff's grievance was found to be meritorious. Id. at 254 n.2. Although the plaintiff argued that the limitations period should not begin to run until he received final notice of the denial of his grievance, the Supreme Court held that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." Id. at 261, citing Electrical Workers v. Robbins & Meyers, Inc., 429 U.S. 229 (1976).

The limitations period in this case thus began to run when Rogers received notice of the employment decision. The fact that the decision was under review or could be reversed does not toll the running of the limitations period under Ricks.

Moreover, on May 10, 1996, Rogers received verbal notice that he had been placed on the list of teachers to be laid off. Rogers' May 13, 1996 Memorandum to the Washington Teachers' Union, where he wrote that Mr. Wesley informed me verbally that I had been placed on a list of nine (9) teachers that will be excess [sic]", further confirms this verbal notification.

The May 30, 1996 Memorandum received by Rogers from Wesley states that:

> The purpose of this memorandum is to notify you that your position has been identified to be submitted to the Division of Human Resources as one of the mandated reductions required of ANACOSTIA High School. Regrettably the mandated district Reduction In Force board mandate . . . will affect the position you currently encumber. The identification of your position has been

> made consistent with the requirements of [the Budget Act] and the revised Board of Education Rules . . . Note that the action referenced in this memorandum is still subject to the review and final decision of the Division of Human Resources. Consistent with information regarding timeliness for notification; official notification will be determined and presented from the Division of Human Resources on June 12, 1996. It is my hope that between now and June 12, 1996 a new revised staffing allocations for secondary school will make it possible to review our reduction in force plan for ANACOSTIA High School.

(Def.'s Mem. Summ. J. at Ex. 20, Mem. From Wesley to Rogers of 5/30/96, at 1.)

While the Memorandum notes that the decision was "still subject to review and final decision of the Division of Human Resources", it is clear that a decision had been made to eliminate Rogers' position. Furthermore, it is clear that Rogers understood that such a decision had been made, as evidenced by his May 13, 1996 Memorandum to the union, his consultations

with an attorney, and the June 10, 1996 letter from his attorney to Wesley and the Superintendent of the Board of Education. The June 10 letter confirms that Rogers and his attorney had concluded by that date that the decision to terminate him was made on an unlawful basis.

The Court finds that Rogers received notice of his impending termination on May 10, 1996, the date on which he acknowledges having received verbal notice of his termination from Wesley. At the latest, however, the decision to terminate Rogers was made by May 30, 1996, when he received the Wesley Memorandum.[4]

Rogers filed his charge with the EEOC on April 16, 1997,[5] 320 days after the commencement of the limitations

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[4]Whether the Court uses the May 10 date or the later May 30 date as the date of notification, the ruling on the pending Motion remains the same.

[5]The Court rejects Rogers' argument that it should consider March 28, 1997, when he first allegedly visited the EEOC

period (assuming the limitations period did not begin to run until May 30, 1996). Rogers' EEOC charge was filed outside the limitations period and is thus barred. Defendant's Motion for Summary Judgment on Rogers' age discrimination claim is therefore **granted**.

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office, as the operative filing date. Although Rogers cites Downes v. Volkswagen of America, Inc., 41 F.3d 1132, 1138 (7th Cir. 1994) for the proposition that the "first contact with EEOC constituted [sic] date of filing charge", courts have held that, while a plaintiff's completion of an intake questionnaire can constitute a "charge" under the ADEA, they have not held that an intake questionnaire always constitutes a charge or that a visit to an EEOC office, without more, constitutes a charge. See, e.g., Park v. Howard Univ., 71 F.3d 904, 909 (D.C. Cir. 1995) ("To treat Intake Questionnaires willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant") (citation omitted); Downes, 41 F.3d at 1138 ("In order to constitute a charge, notice to the EEOC must be of a kind that would convince a reasonable person that the plaintiff manifested an intent to activate the Act's machinery"); Steffen v. Meridian Life Ins. Co., 859 F.2d 534, 542 (7th Cir. 1988) ("The purpose of the charge-filing requirement is to provide the EEOC with sufficient information to notify an employer that it has been charged with discrimination and to provide the EEOC with the opportunity to investigate the alleged unlawful practice").

C. First Amendment Claim

Defendant argues that Plaintiff's failure to include the alleged retaliation for the exercise of his First Amendment Rights in his EEOC charge precludes him from raising the claim here. Plaintiff responds, however, that his First Amendment claim is unrelated to his age discrimination claim. He states that the claim was not included in his EEOC charge because the EEOC does not have jurisdiction over such claims.

It is undisputed by both parties, however, that Plaintiff has not pursued the administrative remedies available to him before bringing his First and Fourteenth Amendment claims for damages before this Court. These claims are thus also barred and summary judgment will be entered for Defendant.

III. Conclusion

The Court has found the absence of any genuine issue of material fact. Further, as a matter of law, Plaintiff Rogers filed his EEOC Charge of Discrimination outside the limitations period and is thus precluded from bringing an employment discrimination action against the District of Columbia. Finally, Rogers failed to exhaust his administrative remedies with respect to his First and Fourteenth Amendment claims. Defendant's Motion for Summary Judgment is this **granted**. An Order will issue with this Opinion.

May 27, 1998
Date

/s/
Gladys Kessler
United States District Judge